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7 UPS SUPPLY CHAIN SOLUTIONS, INC.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 PAULA LABRIE, ALFREDO MACIAS,
13 PETER MILLMAN, TOM
CHORTABTIM, RAF SISON,

14 Plaintiffs,

15 vs.

16 UPS SUPPLY CHAIN SOLUTIONS,
17 INC.,

18 Defendant.

CASE NO. C08-03182 PJH

**DEFENDANT UPS SUPPLY CHAIN
SOLUTIONS, INC.'S NOTICE OF
MOTION AND MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED UNDER FEDERAL RULE OF
CIVIL PROCEDURE 12(B)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

DATE: October 1, 2008
TIME: 9:00 a.m.
DEPT: Crtrm. 3, 17th Floor
JUDGE: Hon. Phyllis J. Hamilton

1 TO PLAINTIFFS PAULA LABRIE, ALFREDO MACIAS, PETER MILLMAN, TOM
2 CHORTABTIM, RAF SISON AND THEIR ATTORNEYS OF RECORD, LYNN ROSSMAN
3 FARIS, PHILIP C. MONRAD, AND JENNIFER KEATING OF LEONARD CARDER LLP:

4 PLEASE TAKE NOTICE that on October 1, 2008 at 9:00 a.m., or as soon
5 thereafter as the matter may be heard, before the Honorable Phyllis J. Hamilton in Courtroom 3,
6 17th Floor, of the United States District Court for the Northern District of California, located at
7 450 Golden Gate Avenue, San Francisco, California, Defendant UPS Supply Chain Solutions,
8 Inc. ("SCS"), will and hereby does move the Court to dismiss Plaintiffs' sixth cause of action for
9 fraud asserted in Plaintiffs' First Amended Complaint ("FAC") pursuant to Federal Rule of Civil
10 Procedure 12(b)(6). Defendant brings this Motion on the grounds that even if all material facts in
11 the FAC are true, Plaintiffs' sixth cause of action for fraud should be dismissed because it is
12 predicated upon Plaintiffs' allegation that Defendant misrepresented employment law to its
13 independent contractor couriers and "fraud cannot be predicated upon misrepresentations as to
14 matters of law.'" *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) (citation
15 omitted); *see also Cruz v. Dollar Tree Stores, Inc.*, No. 07-2050 SC, 2007 WL 2729214, at *3
16 (N.D. Cal. Sept. 18, 2007) (granting defendant employer's motion to dismiss plaintiffs' fraud
17 claim predicated upon an alleged misrepresentation of California wage and hour law).

18 Defendant bases this Motion on this Notice, the Memorandum of Points and
19 Authorities in support thereof, the pleadings on file in this case, and such other oral and
20 documentary evidence as may be presented or at the time of the hearing on this matter.

21 DATED: August 25, 2008 PAUL, HASTINGS, JANOFKY & WALKER LLP

22
23 By: /s/ MICHAEL M. PFYL
24 MICHAEL M. PFYL

25 Attorneys for Defendant
26 UPS SUPPLY CHAIN SOLUTIONS, INC.
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Paula Labrie, Alfredo Macias, Peter Millman, and Tom Chortabtim,
4 couriers who used to work for Defendant SCS on an independent contractor basis, assert in the
5 sixth cause of action in their First Amended Complaint (“FAC”) that SCS committed fraud when
6 it characterized them as independent contractors in their work contracts. In other words,
7 Plaintiffs contend that SCS should have characterized them as employees — not independent
8 contractors — and thus misrepresented their legal status.

9 Plaintiffs’ fraud claim is not actionable, however, because it is predicated upon an
10 alleged misrepresentation of *law*: Plaintiffs claim that SCS misrepresented their entitlement to
11 various employee benefits guaranteed by California and Federal employment laws. But
12 controlling legal precedent provides that to plead an actionable fraud claim a plaintiff must allege
13 a misrepresentation of *fact*. Plaintiffs have not done so, and their FAC fails to state a valid fraud
14 claim.

15 For this reason, and because Plaintiffs have already amended their complaint in an
16 attempt to cure the fatal deficiency in their fraud claim and failed, SCS respectfully requests that
17 the Court dismiss, with prejudice, Plaintiffs’ sixth cause of action for fraud.

18 **II. PROCEDURAL HISTORY**

19 Plaintiffs filed their Complaint on July 2, 2008, alleging (1) failure to pay
20 minimum wage and overtime compensation in violation of the FLSA; (2) failure to pay minimum
21 wage and overtime compensation in violation of the California Labor Code; (3) failure to
22 reimburse employment related expenditures in violation of California Labor Code Section 2802;
23 (4) failure to pay reporting time compensation in violation of California law; (5) waiting time
24 penalties; (6) fraud; and (7) unfair business practices in violation of California Business and
25 Professions Code Section 17200. Counsel for SCS, Robert Kristoff, met and conferred with
26 Plaintiffs’ counsel, Philip Monrad, on July 29, 2008, and requested that Plaintiffs voluntarily
27 dismiss their fraud claim because it is predicated upon a misrepresentation of law and therefore
28 not actionable. Plaintiffs declined, and instead filed a FAC on August 6, 2008, attempting to cure

1 their flawed fraud claim.

2 **III. FACTUAL BACKGROUND**

3 SCS is not United Parcel Service — “Brown” — the package delivery company.
4 Rather, SCS is a sister company to UPS Brown and operates a logistics business.¹ SCS is the
5 only fully integrated logistics company in the world. It manages other companies’ supply chains,
6 i.e. inventories — from the assembly line to the customer’s locations — and does everything
7 related to moving and storing goods for its customers around the world. SCS was formed through
8 the acquisition and combination of over 30 different logistics, warehousing, freight forwarding,
9 customs brokerage and transportation companies into one business. SCS has hundreds of
10 distribution centers throughout the United States and abroad. Each of these distribution centers
11 houses the scores of service offerings SCS provides to its customers.

12 In moving the customer’s products from the assembly line to the customer’s
13 ultimate user, the Transportation Services group at SCS utilizes a variety of independent
14 transportation entities to move the customers’ product, including shipping lines; railroads;
15 independent trucking companies; independent truckers; delivery companies; and independent
16 contractor couriers. None of these transportation entities are owned, operated or controlled by
17 SCS. They are all independent contractors. The couriers are the subject of this lawsuit.

18 For pickups and deliveries of small parcels that need to be delivered to customers
19 on an expedited basis SCS contracts with independent contractor couriers such as the Plaintiffs,
20 who have indicated that they are available to make highly time-sensitive pickups and deliveries.
21 Couriers are always paid by the job — either mileage for longer runs or a fixed rate for shorter
22 deliveries. When SCS receives a delivery order from a customer, a dispatcher contacts one of the
23 local couriers that indicated they are available for deliveries that day. The courier always has the
24 option of accepting or declining any job. If a courier declines a job, the dispatcher contacts the
25 next courier on his list. SCS sets no requirements on whether a courier must be available. It does
26 not require a minimum number of days of availability per week. SCS requests that its
27 independent contractor couriers, including Plaintiffs, sign Independent Contractor Transportation

28 ¹ SCS and UPS Brown are two separate, wholly owned subsidiaries of the same parent company.

1 Agreements acknowledging their status as independent contractors.

2 **IV. APPLICABLE LEGAL STANDARD**

3 Pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court may dismiss
4 claims that fail to allege a “cognizable legal theory” or “sufficient facts . . . under a cognizable
5 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988) (citing
6 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)). In evaluating
7 the allegations, the court looks to the four corners of the complaint, but the court “does not ‘need
8 to accept as true conclusory allegations[,] . . . unreasonable inferences,’ legal characterizations, or
9 unwarranted deductions of fact.” *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F. Supp. 711,
10 718 (C.D. Cal. 1993) (citations omitted; second alteration in original); *see also Sprewell v.*
11 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (when evaluating a motion to dismiss a
12 court is not “required to accept as true allegations that are merely conclusory, unwarranted
13 deductions of fact, or unreasonable inferences”).

14 **V. PLAINTIFFS FAIL AS A MATTER OF LAW TO PLEAD AN ACTIONABLE**
15 **FRAUD CLAIM**

16 In their FAC, Plaintiffs allege that SCS required them to sign Independent
17 Contractor Transportation Agreements which referred to Plaintiffs as independent contractors.
18 (See FAC ¶¶ 66-69.) Plaintiffs further contend that under California and Federal law the terms
19 and conditions outlined in the agreements actually created an employer/employee relationship —
20 not an independent contractor relationship. (*Id.*) In other words, Plaintiffs allege that SCS
21 committed fraud by misrepresenting California and Federal employment law.

22 Even if the Court accepts Plaintiffs’ allegations as true and presumes that SCS
23 misrepresented applicable employment law, however, Plaintiffs have failed to plead an actionable
24 claim because it is axiomatic that a fraud claim cannot be predicated upon misrepresentations of
25 law. *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) (affirming dismissal of
26 fraud claim based on employer’s alleged misrepresentation that Plaintiff was not entitled to
27 overtime compensation); *Cruz v. Dollar Tree Stores, Inc.*, No. 07-2050 SC, 2007 WL 2729214, at
28 *3 (N.D. Cal. Sept. 18, 2007) (granting defendant’s motion to dismiss plaintiffs’ fraud claim

1 predicated upon allegation that defendant misrepresented California wage and hour law). To
2 plead an actionable fraud claim, a plaintiff must allege a misrepresentation of *fact*. *Schroeder v.*
3 *Auto Driveaway Co.*, 11 Cal. 3d 908, 917 (1974). Courts apply this rule because “statements of
4 domestic law are normally regarded as expressions of opinion, which are generally not actionable
5 in fraud even if they are false.” *Miller*, 358 F.3d 616 at 621.

6 Both the Ninth Circuit and this Court have held that misrepresentations of
7 employment law — directly analogous to the misrepresentations Plaintiffs allege here — are not
8 actionable. In *Miller*, the plaintiff alleged that his employer falsely represented that he was
9 exempt from state and federal overtime laws because he was salaried, and did not pay him all of
10 his earned wages. *Id.* at 618. In response, the defendant filed a motion to dismiss Plaintiff’s
11 fraud claim on the grounds that the misrepresentation he alleged was not actionable. *Id.* at 619.
12 In evaluating the employer’s FRCP 12(b)(6) motion, the Ninth Circuit noted that as a general rule
13 fraud cannot be predicated upon misrepresentations of law. *Id.* at 621. The Court also concluded
14 that the alleged misrepresentation — that Miller was correctly classified as an exempt employee
15 and not entitled to overtime compensation — was a misrepresentation of *law* and did not include
16 any express or implied misrepresentation of *fact*. *Id.* 621-22. Accordingly, the Court affirmed
17 the trial court’s decision to dismiss Plaintiff’s fraud claim with prejudice and deny Plaintiff’s
18 request for leave to amend. *Id.* at 622-23.

19 Similarly, in *Cruz*, this Court granted the defendant employer’s motion to dismiss
20 plaintiffs’ fraud claim because it was predicated on an unactionable misrepresentation of
21 employment law. *Cruz*, 2007 WL 2729214, at *3. Plaintiffs worked for Defendant as Store
22 Managers and alleged that Defendant “committed fraud by inducing Plaintiffs and members of
23 their Class to work in excess of eight hours per day and forty hours per week without expectation
24 on their part that they were entitled to receive compensation for overtime worked.” *Id.* at *1. The
25 Plaintiffs argued that Defendant’s statements regarding entitlement to overtime pay were in fact
26 misrepresentations of fact, not law, “‘because it was the fact [that the plaintiffs] were truly
27 managers [that] was misrepresented.’” *Id.* at *3. To clarify this argument, the Plaintiffs stated:
28 “‘when an employer merely classifies someone as a manager and then employs them to perform

1 mostly non-managerial tasks, a misrepresentation of the fact of the employee's status has
 2 occurred." *Id.* But this Court flatly rejected Plaintiffs' argument:

3 Plaintiffs fail to recognize that the central issue in the [fraud] claim
 4 revolves around the classification of the employment status of
 5 Plaintiffs. This question is a question of law. . . . That the disputed
 6 statements in the present case are of law and not fact is further
 7 supported by recent district court decisions. . . . this Court finds that
 the question of whether a certain class of employees is exempt is a
 question of law. Therefore, Defendant's Rule 12(b)(6) motion to
 dismiss the [fraud claim] for failure to state a claim is granted.

8 *Id.* at *3. Moreover, the Court denied Plaintiffs' request for leave to amend their fraud claim
 9 because it was predicated on a misrepresentation of law, it could not be saved by another
 10 amendment, and giving Plaintiffs an opportunity to amend would "likely be futile and result in
 11 undue delay." *Id.* at *5.

12 Just as the plaintiffs in *Miller* and *Cruz* alleged that their employers misclassified
 13 them as exempt from overtime laws and misrepresented their entitlement to overtime
 14 compensation, here Plaintiffs allege that SCS misclassified them as independent contractors and
 15 misrepresented their entitlement to various employee benefits under California and Federal law.
 16 In short, Plaintiffs allege that SCS misrepresented their legal status as independent contractors.
 17 Because the misrepresentation Plaintiffs allege is one of law, not fact, this Court should dismiss
 18 Plaintiffs' fraud claim in accordance with controlling legal precedent.

19 SCS anticipates that in opposition Plaintiffs will attempt to revive their flawed
 20 fraud claim by arguing that their FAC alleges SCS made an implicit misrepresentation of fact.
 21 Specifically, Plaintiffs' FAC states:

22 By demanding that Plaintiffs and the Plaintiff Class sign these
 23 Agreements, [SCS] implicitly represented to its drivers that the
 24 factual elements underlying these Agreements supported [SCS]'s
 25 characterization of these Agreements as independent contractor
 agreements, so that the Agreements would, in fact, create an
 independent contractor relationship between [SCS] and Plaintiffs
 and the Plaintiff class.

26 (FAC ¶ 68.) But this allegation mischaracterizes the representation at issue and merely echoes
 27 the same meritless argument this Court considered and rejected in *Cruz*. There, the plaintiffs
 28 argued that by misrepresenting Plaintiffs' exempt status the employer misrepresented the "fact of

the employees' status"; *i.e.* the employer represented that the plaintiffs were exempt managers but "in fact" they were not. In *Cruz*, this Court recognized the circular nature of Plaintiffs' argument, rejected it, and concluded that the "central issue" in the fraud claim was a legal one. The Court should do the same here. Plaintiffs allege that by misrepresenting Plaintiffs as independent contractors, SCS misrepresented that the agreements would, "in fact," create an independent contractor relationship. However, this circular argument cannot disguise the fact that the central issue in Plaintiffs' fraud claim is a legal one: whether the law entitled Plaintiffs to receive various employee benefits.

Accordingly, this Court should dismiss Plaintiffs' fraud claim pursuant to FRCP 12(b)(6) because Plaintiffs have failed to plead an actionable misrepresentation of fact.

VI. THE COURT SHOULD DISMISS PLAINTIFFS' FRAUD CLAIM WITH PREJUDICE AND WITHOUT LEAVE TO AMEND

In situations where a plaintiff previously filed an amended complaint, a district court has "particularly broad" discretion to deny leave to amend. *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002). Additionally, where a claim cannot be saved by amendment, it is proper for a court to deny leave to amend. *Eminence Capital LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (holding that dismissal without leave to amend is improper unless the complaint could not be saved by amendment).

Here, counsel for SCS met and conferred with Plaintiffs' counsel on July 29, 2008, informed him that Plaintiffs' fraud claim is deficient because it alleges a misrepresentation of law, and requested that Plaintiffs voluntarily dismiss the claim. Plaintiffs' counsel declined and, instead, filed an FAC to address the deficiency in the fraud claim. Plaintiffs have thus already amended their fraud claim and failed to cure its fatal flaw. Moreover, "because Plaintiffs' [fraud claim] is predicated on a misrepresentation of law, it cannot be saved by an additional amendment." *Cruz*, 2007 WL 2729214, at *5. Allowing Plaintiffs to amend their complaint again would merely result in undue delay and unnecessary litigation.

1 **VII. CONCLUSION**

2 For all the foregoing reasons, Defendant respectfully requests that the Court grant
3 its motion and dismiss with prejudice Plaintiffs' sixth cause of action for fraud.

4 DATED: August 25, 2008 PAUL, HASTINGS, JANOFSKY & WALKER LLP

5
6 By: /s/ MICHAEL M. PFYL
7 MICHAEL M. PFYL

8 Attorneys for Defendant
9 UPS SUPPLY CHAIN SOLUTIONS, INC.
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